Supreme Court, U.S.
FILED
JUN 4 1996

(3)

No. 95-1730

# In the Supreme Court of the United States

OCTOBER TERM, 1995

NORTHROP GRUMMAN CORPORATION
AND NORM BUSSARD,
*Petitioners,*
v.
MICHAEL E. GREEN,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION

BRAD D. BRIAN
*Counsel of Record*
KRISTIN A. LINSLEY
INEZ D. HOPE
DANIEL P. COLLINS
MUNGER, TOLLES & OLSON
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
*Counsel for Petitioners*

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

15 pp

## TABLE OF CONTENTS

Page

A. A Comprehensive Federal Statutory Scheme Cannot Be Supplemented With Federal Common Law Rules 1

1. Respondent's Argument That Congressional Silence Empowers The Courts To Create Federal Common Law Flies In The Face Of This Court's Precedents ..... 1

2. Respondent's Attempts To Distinguish *Mezzanatto* Are Unavailing ..... 3

B. There Is No "Uniquely Federal Interest" In The Release Of A Federal Cause Of Action ..... 4

1. Respondent's Inability To Defend The Ninth Circuit's Analysis Of This Issue Confirms The Need For Review By This Court ..... 4

2. Respondent's Effort To Defend The Ninth Circuit's Judgment On Other Grounds Is Wholly Unpersuasive ..... 6

C. Respondent's Effort To Downplay The Conflict Between The Ninth Circuit And Other Circuits Is Unavailing ..... 9

## TABLE OF AUTHORITIES

### Cases


| | Page |
|---|---|
| *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) | 5, 7, 8 |
| *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) | 4 |
| *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) | 7 |
| *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952) | 5 |
| *Fisher v. Eckert*, 94 Cal. App. 2d 890 (1940) | 10 |
| *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) | 10 |
| *Matsushita Elec. Industrial Co. v. Epstein*, 116 S. Ct. 873 (1996) | 9, 10 |
| *Milwaukee v. Illinois*, 451 U.S. 304 (1981) | 2, 3 |
| *Miree v. DeKalb County*, 433 U.S. 25 (1977) | 7 |
| *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 | 2, 3 |
| *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981) | 2, 8 |
| *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994) | *passim* |
| *Roybal v. University Ford*, 207 Cal. App. 3d 1080 (1989) | 10 |
| *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) | 8 |
| *Town of Newtown v. Rumery*, 480 U.S. 386 (1987) | 5 |
| *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) | 7 |
| *United States v. Mezzanatto*, 115 S. Ct. 797 (1995) | 1, 3, 4, 9 |
| *United States v. Standard Oil Co.*, 332 U.S. 301 (1947) | 7 |
| *Westfall v. Ervin*, 484 U.S. 292 (1988) | 7, 8 |

## TABLE OF AUTHORITIES

### Statutes


| | Page |
|---|---|
| 31 U.S.C. § 3730(e)(4)(A) ..... | 6 |
| 31 U.S.C. § 3730(b)(5) ..... | 6 |

No. 95-1730

# In the Supreme Court of the United States

OCTOBER TERM, 1995

NORTHROP GRUMMAN CORPORATION
AND NORM BUSSARD,
*Petitioners,*

v.

MICHAEL E. GREEN,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION

Respondent's Brief in Opposition confirms the need for review by this Court. With respect to the first issue raised by the petition, respondent simply cannot distinguish this Court's decisions in *O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048 (1994), and *United States v. Mezzanatto*, 115 S. Ct. 797 (1995); under either decision, the Ninth Circuit's decision is clearly wrong. As to the second issue, respondent all but concedes that the Ninth Circuit erred in failing to identify a "uniquely federal interest" that was implicated in this case, and his effort to provide a post-hoc justification for the Ninth Circuit's decision is wholly unavailing. Finally, respondent cannot reconcile the obvious conflict between the Ninth Circuit's expansive construction of its authority to create federal common law and the far more restrictive approach applied in other circuits; his only suggestion for harmonizing the cases is to point to the irrelevant fact that the other circuit court cases did not involve claims under the False Claims Act ("FCA").

## A. A Comprehensive Federal Statutory Scheme Cannot Be Supplemented With Federal Common Law Rules

Despite respondent's confused and conflicting attempts to justify the result reached by the Ninth Circuit, the court's creation of federal common law under the circumstances presented here simply cannot be reconciled with this Court's precedents. As explained in the petition, this Court repeatedly has made clear that where Congress has enacted a comprehensive and detailed statutory scheme, courts are not free to supplement the statute with federal common law. Pet. at 7-8. The Ninth Circuit clearly departed from this well-settled principle by employing "federal common law" effectively to amend the FCA's comprehensive legislative scheme by adding an entirely new provision — "that prefiling releases of *qui tam* claims, when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim." Pet. App. at 24a.

### 1. Respondent's Argument That Congressional Silence Empowers The Courts To Create Federal Common Law Flies In The Face Of This Court's Precedents

Respondent first tries to justify the Ninth Circuit's federal common law rule by claiming that it does not "supplement" the FCA at all, but merely fills a "gap" with respect to an issue on which the

statute is silent. Opp. at 3-4. The factual premise of this argument — that the statute is "silent" on the issue presented here but that creating a federal common law rule to resolve the issue is not "supplementing" the statute — is pure semantics at best. Indeed, it is hard to imagine what word other than "supplement" could be used to describe the court's creation, from whole cloth, of an entirely new federal common law rule that adds significant and entirely nontextual substantive provisions to a federal statute.

Equally unavailing is respondent's argument that, because Congress purportedly did not "contemplate" the issue of prefiling releases in the FCA, the Ninth Circuit was authorized to add a new federal common law rule on that subject. Opp. at 3-4. *See also id.* at 5, 7 (suggesting that Congress' failure to address a particular issue in an otherwise comprehensive and detailed statute such as the FCA qualifies as an "absence of legislation" removing the case from the *Northwest Airlines/O'Melveny* framework). This line of argument repeatedly has been rejected by this Court, which has made clear that the enactment of a comprehensive statutory scheme precludes the creation of federal common law not only as to matters that Congress specifically addressed in the statute, but also as to matters that Congress, for whatever reason, did not address. *See O'Melveny*, 114 S.Ct. at 2054 ("matters left unaddressed" by a federal statutory scheme may not be supplemented by federal common law); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (refusing to recognize a claim for loss of society under the Death on the High Seas Act where the statute did not address the issue).[1] Indeed, the notion that a federal court can make up its own substantive rules

---

[1] Also without merit is respondent's argument that the principles discussed above apply only where the proposed rule of federal common law would create "an implied remedy or defense where Congress ha[s] already provided an explicit remedy or defense." Opp. at 13. This argument is inconsistent with the separation of powers principles that underlie this Court's cases (*see, e.g., Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981)) — principles of relative legislative and judicial competence that are not limited to the narrow area of the creation of new claims or defenses. Moreover, the argument is inconsistent with *O'Melveny* itself, which did not involve a proposed new federal common law defense, but rather a proposed federal common law rule regarding the imputation of defenses. *O'Melveny* cannot plausibly be distinguished from this case, which involves

whenever it thinks of an issue that "was not contemplated by Congress" in enacting a statute (Opp. at 3) would turn on its head the constitutional principle of separation of powers, and indeed would render the judicial power to legislate virtually limitless.

Finally, contrary to respondent's assertion, the fact that an issue not specifically addressed by a federal statute arises "in an area concerning federal interests" (Opp. at 5) does not alter the above analysis or reverse the presumption described in *O'Melveny*. This Court consistently has made clear that even "in an area of national concern" that might be appropriate for the creation of federal common law in the absence of legislation—such as the regulation of interstate disputes or admiralty — the enactment of a comprehensive statutory scheme displaces judicial power in the area; once Congress has determined the appropriate nature and extent of federal regulation in such an area, "there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee v. Illinois*, 451 U.S. 304, 319 (1981). *See also O'Melveny*, 114 S.Ct. at 2054 (refusing to "supplement" FIRREA with federal common law, despite the asserted "high federal interest in this area"); *Mobil Oil*, 436 U.S. at 625 (that admiralty is an area traditionally governed by federal common law does not justify federal common law where Congress has comprehensively legislated).

### 2. Respondent's Attempts To Distinguish *Mezzanatto* Are Unavailing

Far from authorizing a federal common law rule precluding any prefiling waiver of the right to sue under the FCA, Congress' acknowledged silence on the subject compels application of the settled rule that "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties." *Mezzanatto*, 115 S.Ct. at 801.

In a singularly tortured effort to distinguish *Mezzanatto*, respondent suggests that where Congress has expressly limited waiver of a right and thereby reversed the *Mezzanatto* presumption under certain specified circumstances, that fact permits the courts to ignore

---

a proposed federal common law rule designed to eliminate the otherwise available defense of release.

the presumption and prohibit waiver in *other* circumstances as well. Thus, he cites a provision addressing the prerequisites for dismissing a *qui tam* action *after* it is filed in court and argues that the Ninth Circuit was free to impose similar limitations on the waiver of *qui tam* rights *before* any *qui tam* suit is filed. Opp. at 14-15.

Respondent's position is both internally inconsistent and legally incorrect. His claim that Congress has "manifested its intent" to negate the *Mezzanatto* presumption in the prefiling context (Opp. at 14-15) simply cannot be reconciled with his earlier assertion that the FCA is "completely silent" on the issue of prefiling releases (*id.* at 3). Respondent cannot have it both ways. To the extent that the statute indeed is "completely silent" on the subject of prefiling releases — as the Ninth Circuit concluded and as respondent argued earlier in his analysis — *Mezzanatto* is dispositive of the issue. As for the provision addressing *post*filing releases, Congress' decision to override the *Mezzanatto* presumption only in certain specified contexts strongly confirms that it must be presumed to have intended to permit voluntary waiver in all other contexts. *See O'Melveny*, 114 S.Ct. at 2054.[2]

### B. There Is No "Uniquely Federal Interest" In The Release Of A Federal Cause Of Action

#### 1. Respondent's Inability To Defend The Ninth Circuit's Analysis Of This Issue Confirms The Need For Review By This Court

Respondent candidly concedes (as he must) that "[t]he identification of a 'uniquely federal interest' establishes a 'necessary . . . condition for the displacement of state law.' " Opp. at 8 (quoting

---

[2]Respondent's claim that *Mezzanatto* "did not purport to overrule" *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), (Opp. at 15, n.12), is true, but irrelevant. In *Brooklyn Savings Bank*, the Court held that Congress, in enacting the minimum wage provisions of the Fair Labor Standards Act, intended to preclude private contracts waiving payment of the minimum wage required by the statute. *Id.* at 706-07. This conclusion makes perfect sense, given that the whole point of a minimum wage provision was to restrict the freedom to contract for a lesser wage. The Court in *Mezzanatto* thus correctly distinguished *Brooklyn Savings Bank* as a case involving a specific Congressional intent to preclude waivers. *Mezzanatto*, 115 S.Ct. at 804 n.4. No such intent is present here.

*Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988)). He is unable, however, to cite any part of the Ninth Circuit's opinion that even discusses this essential requirement, much less explains how it is satisfied in this case. The reason is obvious enough: The Ninth Circuit simply ignored this crucial limitation on its authority and arrogated to itself the power to displace state law that, in its view, conflicted with federal "policy." Pet. at 19-21.

Respondent makes only a half-hearted effort to defend the ground actually relied upon by the Ninth Circuit to justify its excursion into federal common law. The court held that " 'federal law always governs the validity of releases of federal causes of action,' " and then assumed, without more, that it therefore was free to set aside any principles of state contract law that conflicted with the court's notions of FCA "policy." Pet. App. at 9a. What the Ninth Circuit failed to recognize is that even when federal common law nominally governs a field, the existence of a "uniquely federal interest" remains a necessary condition for the "displacement of federal-law reference to state law for the rule of decision." *Boyle*, 487 U.S. at 507 & n.3.

Respondent's only defense of the Ninth Circuit's analysis is to argue in a footnote that *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952), requires the application of uniform federal standards, because otherwise "federal rights could easily be defeated." Opp. at 9 n.6. However, *Dice* did *not* hold that there was a uniquely federal interest in the release of a federal cause of action. Rather, *Dice* displaced state law only because the particular statute at issue was construed to *require* the promulgation of a uniform federal-common-law rule. Pet. at 24-25. Further, although *Dice* did state, as respondent notes, that federal law "*ultimately* control[s] the question of the validity of a release," Opp. at 9 n.6 (emphasis added), that fact is insufficient to establish that there is a uniquely federal interest in the release of a federal cause of action. *Boyle*, 487 U.S. at 507 & n.3; *see also O'Melveny*, 114 S. Ct. at 2053-54.[3]

---

[3]Respondent also makes the erroneous assertion that petitioners did not object to the Court of Appeals' application of *Town of Newton v. Rumery*, 480 U.S. 386 (1987), which respondent describes as having established an all-purpose "federal common law" test for determining the validity of a release. Opp. at 10 n.8. The petition notes that *Rumery*'s application of a uniform federal standard for judging the validity of a release of rights under § 1983 was based on the well-settled rule — specific to the § 1983 con-

**2. Respondent's Effort To Defend The Ninth Circuit's Judgment On Other Grounds Is Wholly Unpersuasive**

The bulk of respondent's opposition is devoted, not to justifying the Ninth Circuit's indefensible analysis, but to arguing that the Ninth Circuit's holding was nonetheless proper because a uniquely federal interest *was* implicated in this case. Opp. at 5-10. Respondent does not (and could not) dispute petitioners' assertion that this Court has narrowly circumscribed the range of uniquely federal interests that will justify the displacement of state law. Pet. at 20. The instant case plainly does not involve admiralty or an interstate or international dispute, and respondent's valiant post-hoc attempt to fit the case into the last remaining category — cases concerning the rights and obligations of the United States — is wholly unpersuasive.

Respondent contends that a uniquely federal interest was present here because "enforcement of the FCA is germane to the 'rights and obligations of the United States.' " Opp. at 6. This claim is unavailing for the simple reason that the rights and obligations of the United States *never were at issue in this case.* The United States was not a party to the state-court settlement entered into between Northrop and respondent, and its legal rights and obligations were in no way diminished or affected by that agreement. On the contrary, the release merely reflected the fact that, as part of the settlement of his state court wrongful discharge action, *respondent* voluntarily relinquished his *own* right to bring a suit against Northrop "under any theory under the law." Pet. App. at 32a. The release did not in any way preclude the United States (or another *qui tam* relator), either as a legal or a practical matter, from pursuing an FCA action.[4] Indeed, as the district court expressly noted, the United States

---

text — that that statute must be construed in light of the general principles of the common law that were applicable at the time § 1983 was enacted. Pet. at 18 n.4.

[4]Respondent contends that an action brought by another *qui tam* relator would have been barred (1) by 31 U.S.C. § 3730(e)(4)(A) because the allegations had been "publicly disclosed" in the state court action; and (2) by 31 U.S.C. § 3730(b)(5) because the allegations were contained in the instant FCA action. Opp. at 1-2. Neither of these claims, of course, establishes that the *release* would have barred another *qui tam* relator from bringing suit.

conducted an intensive investigation and affirmatively made a decision not to pursue the allegations. Pet. App. at 33a.

Respondent contends, however, that the United States would never have learned of the allegations had this *qui tam* suit not been filed, and that the release therefore *might* have made it less likely, as a practical matter, that the government would bring a suit. Opp. at 1. This unsupported speculation overlooks the fact that respondent remained free, at all times, to communicate his allegations to the United States; it ignores the significant resources available to the government to investigate and monitor the performance of defense contractors; and it appears flatly inconsistent with respondent's frank concession (Opp. at 1) that the allegations were "publicly disclosed," within the meaning of the FCA, by their inclusion in his *state-court* action.

More importantly, respondent's point is simply irrelevant. The mere fact that a state-court global settlement might conceivably have the ultimate practical effect, through some attenuated chain of causation, of making it less likely that the government will assert its legal rights does not establish that the private settlement itself implicates "the rights and obligations of the United States" within the meaning of this Court's federal common law cases. *See Boyle*, 487 U.S. at 506 (noting that, in such circumstances, " 'any federal interest in the outcome of the [dispute]' " is " 'far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern' ") (quoting *Miree v. DeKalb County*, 433 U.S. 25, 32-33 (1977)). Indeed, given the omnipresence of the federal government in the modern economy, almost any private contract will have some practical effect on the government's rights (*e.g.*, its ability to collect taxes from the contracting parties), and if the speculative possibility of affecting the United States' ability to assert its rights were enough to implicate uniquely federal interests, then "we would be awash in 'federal common law' rules," *O'Melveny*, 114 S. Ct. at 2055.

Rather, the uniquely federal interest in the "rights and obligations of the United States" is implicated only when the state law at issue would redefine the legal rights of the United States government, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *United States v. Standard Oil Co.*, 332 U.S. 301, 305-06 (1947); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943), would impose liability on federal employees for official acts, *Westfall*

*v. Ervin*, 484 U.S. 292, 295 (1988), or would impose liability on federal contractors for actions taken pursuant to the directions and specifications of the federal government, *Boyle*, 487 U.S. at 505-07. In each of these situations, the application of state law would permit the states either to define the substantive legal rights of the United States or to prescribe substantive standards regulating the performance of sovereign acts of the federal government. Because "the authority and duties of the United States *as sovereign* are intimately involved," *Texas Industries Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (emphasis added), there is in each of these situations a uniquely federal interest warranting the displacement of state law. *See also Northwest Airlines*, 451 U.S. at 95 (noting that there is a uniquely federal interest in "the *definition* of rights or duties of the United States") (emphasis added).

By contrast, there is no such interest here, because the application of state contract law would neither define the substantive legal rights of the United States nor regulate the performance of a federal sovereign act. Rather, state law would merely define the legal rights of private parties who wished to settle all outstanding disputes between them in order to resolve a pending state-court action.[5]

---

[5]For similar reasons, respondent's extensive reliance on the general purposes served by the FCA — such as the recoupment of "fraudulently-paid public monies" and the promotion of sound "federal fiscal policy" — is misplaced. Opp. at 7 (citation and internal quotation marks omitted). Although respondent contends that the FCA effectively creates a "unilateral contract" by which a *qui tam* relator is "assign[ed]" some of the substantive rights of the government, Opp. at 8, he overlooks the crucial fact that what is at issue here is *not* the scope of substantive governmental rights that have been "assigned" to respondent. Rather, the sole question here concerns the validity of a state-court contract under which respondent bargained away his right to receive such an "assignment" and to bring suit under the FCA. There is no "uniquely federal interest" in the ability of Michael E. Green to bring a suit under the FCA. *See Texas Industries*, 451 U.S. at 642 (noting that there is no uniquely federal interest in private rights created by federal statutes, despite the fact that vindication of these private rights "supplements federal enforcement and fulfills the objects of the statutory scheme").

### C. Respondent's Effort To Downplay The Conflict Between The Ninth Circuit And Other Circuits Is Unavailing

Ignoring the fact that the Ninth Circuit's view of its authority to create federal common law is irreconcilable with that of several other circuits, respondent dismisses this split of authority on the *sole* ground that none of the cases in the other circuits involved a claim under the FCA. Opp. at 15-16. That argument would be persuasive only if there were some basis for believing that the Ninth Circuit's different approach to federal common law is *based on the FCA*. (One cannot argue away a split of authority without establishing that the proffered ground of distinction is a *relevant* one.) In this case, however, neither of the Ninth Circuit's two critical errors — *viz.*, its misapplication of *O'Melveny* and *Mezzanatto* and its disregard of the "uniquely federal interests" requirement—was rooted in principles unique to the FCA. *Cf. Matsushita Elec. Industrial Co. v. Epstein*, 116 S. Ct. 873, 877 (1996) (certiorari granted because lower courts had "taken various approaches" to determining the preclusive effect of a state court judgment that released "exclusively federal" claims; cases cited by the Court as reflecting this split involved federal claims under *different* provisions of the securities laws).

Moreover, respondent's implicit suggestion that this Court should wait for a very narrow split to emerge over the role of federal common law in releases *under the FCA* is inconsistent with this Court's interest in selecting those cases that will maximize its ability to provide guidance on unsettled legal questions that divide the lower courts. In particular, the threshold question whether to apply state law in judging the validity of a release of a federal cause of action is one that has divided the lower courts for years and has led to specific circuit splits in the context of at least three different federal statutes. Pet. at 28. There is no reason to wait for another case: This petition squarely raises that threshold question, and it therefore provides an appropriate vehicle for resolving all of these splits in a single case.[6]

---

[6]Respondent objects to petitioners' suggestion that this Court's recent decision in *Matsushita* provides an alternative basis for concluding that the Ninth Circuit erred. Opp. at 16. Although respondent argues that the petitioners have failed to show that the state court proceedings were

Dated: June 3, 1996

Respectfully submitted,

BRAD D. BRIAN
*Counsel of Record*
KRISTIN A. LINSLEY
INEZ D. HOPE
DANIEL P. COLLINS
MUNGER, TOLLES & OLSON
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100
*Counsel for Petitioners*

---

terminated by a "judgment," he overlooks well-established California law, which provides that a voluntary dismissal of a state court action with prejudice (as occurred here) constitutes a determination on the merits and is res judicata. *See, e.g., Roybal v. University Ford*, 207 Cal. App. 3d 1080, 1085-86 (1989); *Fisher v. Eckert*, 94 Cal. App. 2d 890, 892-94 (1940). Respondent's argument that a federal court need not give full faith and credit to a state court judgment releasing a federal claim if the federal court deems the release to be "unenforceable," Opp. at 16, is flatly inconsistent with the Full Faith and Credit Act: "Federal courts may not 'employ their own ... rules in determining the effect of state judgments,' but must 'accept the rules chosen by the State from which the judgment is taken.' " *Matsushita*, 116 S. Ct. at 877 (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982)). In any event, respondent's various objections would be more appropriately addressed by the lower courts after a remand for reconsideration in light of *Matsushita*. Accordingly, if this Court declines plenary review of the questions raised in this petition, then the Court should vacate the Ninth Circuit's judgment and remand the case to that court with instructions to remand the case to the district court for further proceedings in light of *Matsushita*.